IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2008 Session

DANNY A. STEWART v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 2000-A-431, 2000-C-1395, 2002-I-1191 Steve Dozier, Judge

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No. M2007-02395-CCA-R3-PC - Filed November 13, 2008

The petitioner, Danny A. Stewart, appeals the Davidson County Criminal Court's denial of post-conviction relief. The petitioner pleaded guilty in the trial court to numerous drug-related charges, subject to sentencing. Following a sentencing hearing, the trial court imposed an effective Department of Correction sentence of 42 years. The sentence was affirmed on appeal. *See State v. Danny Avery Stewart*, No. M2003-00664-CCA-R3-CD (Tenn. Crim. App., Nashville, May 24, 2004), *perm app. denied* (Tenn. 2005). Following an evidentiary hearing, the post-conviction court denied relief. The appellate claims to post-conviction relief are limited to issues of (1) ineffective assistance of trial and appellate counsel and (2) involuntariness of the guilty pleas. We affirm the order of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, Danny A. Stewart.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In the post-conviction evidentiary hearing, the petitioner testified that his original retained counsel (Counsel I) became ill and that his family retained a second attorney (Counsel II) who handled the guilty pleas, sentencing, and appeal. The petitioner testified that he met with his new counsel twice before the scheduled trial date. On that date, according to the petitioner, counsel asked him to plead guilty "to save the Judge and the State money" and stated that he would "get [the petitioner] Community Corrections." The petitioner testified that, at the time, he had been incarcerated for two and one-half years and was suffering from cancer.

The petitioner testified that, when he pleaded guilty, he did not know how much incarceration time he could receive and thought he would receive a placement in a community corrections program. He testified that he would not have pleaded guilty but for the promise of a community corrections placement.

Counsel I testified in the hearing that he had practiced law for 42 years and had tried hundreds of cases. Counsel I was retained to represent the petitioner on his drug charges. Counsel testified that he met with the petitioner approximately 15 times, reviewed the discovery materials, and interviewed the police officers and the petitioner's family members. Counsel I testified that he explained to the petitioner the nature of and prospective penalties for the charges he faced. Counsel I testified that he was certain he informed the petitioner of the maximum punishment that could result from the 38-count indictment, including the possibility of consecutive sentencing. He testified that he did not become ill but that, rather, his wife became ill with cancer – "[I]t was her that got sick, not me." Counsel's wife's illness necessitated a number of continuances in the petitioner's case, so much so that counsel recommended to the petitioner that he accept the State's offer of a 20-year sentence. Counsel I testified that Counsel II entered the case as co-counsel but that he remained on the case and went to court on the scheduled trial date anticipating defending the petitioner at trial. Counsel I testified that he and Counsel II conducted "many discussions" about the case and that both of them represented the petitioner eight or ten months before the scheduled trial date.

Counsel I testified, "I made preparations for trial and worked most of the weekend on getting ready and was fine to go to trial that morning." Counsel I testified that he spoke with the petitioner on the morning of the trial date and learned that the petitioner remained resolute to go to trial. Later, Counsel II spoke with the petitioner, after which the petitioner told Counsel I that he was going to plead guilty because he was going to get a community corrections placement. Counsel I told the petitioner that he had no chance of getting such a placement, but the petitioner remained fixed upon entering guilty pleas.

Counsel I testified that the petitioner was aware that the terms of the plea agreement he accepted called for charges being dismissed against other co-defendants and family members. Counsel I testified that he and Counsel II both reviewed the plea agreement with the petitioner. Counsel I opined that, following the plea colloquy before the judge, the petitioner knew and understood the rights he was waiving and that the petitioner exercised his free will in entering the pleas – "it was his decision."

Counsel I testified that Counsel II handled the petitioner's appeal, assisted by Counsel III.

Counsel III testified that she had "quite extensive experience" in handling appeals in criminal cases. Counsel II asked her to assist in the petitioner's appeal. She explained that the object of the appeal was a reduction in the petitioner's effective sentence. Counsel III agreed that she did not include in the record on the petitioner's direct appeal the transcript of his plea submission hearing.

Counsel II testified in the evidentiary hearing that he began practicing law in 1985 and practiced almost exclusively in criminal defense work, having had prior experience as both an assistant public defender and an assistant district attorney. He was retained to represent the petitioner several months before the pleas were entered and testified that he met with the petitioner several times during this period. Counsel II recounted that within the first two meetings with the petitioner, he "had gone over with him exactly what he was facing with respect to what the individual charges were and what the range of punishment was." He recalled that the State's offer of 20 years was less "than the minimum sanction if the petitioner had gotten convicted of both cases." Counsel II testified that he acquainted the petitioner with the extra difficulty posed by the petitioner's being on bond for another crime when he committed some of the charged offenses. Counsel II testified that the State's offer of 20 years had been revoked prior to the day scheduled for trial. He recalled that, as of the day of trial, "the only bone [the State] was willing to throw to us . . . was to cut out the – a couple of the other relatives."

Counsel II testified that he and the petitioner on occasion had discussed the possibility of a community corrections placement, and Counsel II had agreed to ask for such a placement at the sentencing hearing. "But," said Counsel II, "there was never any guarantee; there was never any promise, never any assurance." Counsel II testified that Counsel I advised the petitioner that he could not prevail at a trial, and Counsel II told the petitioner that "it would be better if we had accepted responsibility than if we had not." Counsel II opined that the petitioner, faced with the reality that "[t]here was no putting off the decision any longer," decided to plead guilty "hoping . . . [to] get some relief from the Court."

Counsel II recalled that the petitioner had cancer, had undergone chemotherapy during his pretrial incarceration, and looked very ill and frail at the time the plea was entered. Counsel II entertained hopes that the petitioner's medical condition and his appearance would influence the trial judge to impart leniency in sentencing.

Counsel II opined that the petitioner understood the rights he waived via pleading guilty and that he did so freely.

Following the hearing, the post-conviction court entered extensive written findings of fact and conclusions of law resulting in the denial of all the petitioner's claims. The court accredited the testimony of the various attorneys and held that the petitioner had not established by clear and convincing evidence that trial counsel had performed deficiently. The court also held that, even if the petitioner's appellate counsel had performed deficiently in not preparing a full record for direct appellate review, the petitioner failed to establish prejudice in view of the appellate court's adjudication of the sentencing issue on direct appeal, the lack of a full record notwithstanding. The post-conviction court also held that the claims of involuntary or unknowing guilty pleas were belied by the testimony of counsel and by the trial court record.

On appeal, the petitioner claims that the post-conviction court erred in denying his claims of ineffective assistance of counsel and involuntary guilty pleas. We disagree.

The post-conviction petitioner is obliged to establish his claims by clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2003). On appeal, the appellate court affords the trial court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

The Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "'[w]hether the advice given or the service rendered by the attorney [is] within the range of competence demanded by attorneys in criminal cases.'" *Summerlin v. State*, 607 S.W.2d 495, 496 (Tenn. Crim. App. 1980) (second alteration in original).

In *Strickland v. Washington*, the United States Supreme Court outlined the requirements necessary to demonstrate a violation of the Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and must demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Constitution. *Id.* at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him and that errors were so serious as to deprive the petitioner of a fair trial, calling into question the reliability of the outcome. *Id.*; *Henley*, 960 S.W.2d at 579.

The court does not "second guess" tactical and strategic choices pertaining to defense matters and does not measure a defense attorney's representation by "20-20 hindsight." *Henley*, 960 S .W.2d at 579 (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Rather, a court reviewing counsel's performance should "eliminate the distorting effects of hindsight . . . [and] evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). On the other hand, "deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *Id.*

To establish prejudice, a party claiming ineffective assistance of counsel must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If prejudice is absent, there is no need to examine allegations of deficient performance. *Id.* at 697, 104 S. Ct. at 2069.

When it is alleged that the ineffective assistance of counsel resulted in a guilty plea, the burden is upon the defendant to establish the prejudice prong of *Strickland* by proving that "there

is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). On review, there is a strong presumption of satisfactory representation. *Barr v. State,* 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

Apart from and in addition to the strictures of the Sixth Amendment, principles of due process demand that a guilty plea be entered voluntarily, knowingly, and understandingly. *See Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 1711-13 (1969). "[T]he core requirement of *Boykin* is 'that no guilty plea be accepted without an affirmative showing that it was intelligent and voluntary.'" *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Fontaine v. United States*, 526 F.2d 514, 516 (6th Cir. 1975)). The plea must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). A plea is involuntary if the accused is incompetent or only "if it is the product of 'ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *Blankenship*, 858 S.W.2d at 904 (quoting *Boykin*, 395 U.S. at 242-43, 89 S. Ct. at 1712).

In the present case, the petitioner pinned his claims of ineffective assistance of trial counsel and of involuntary guilty pleas upon his assertion that Counsel II induced him to plead guilty via a promise of a community corrections placement. He further posits that counsel did not inform him of the range of punishment he could receive upon sentencing by the trial court. The post-conviction court, however, accredited the testimony of counsel who recounted not only that he informed the petitioner of his exposure both to lengthy sentences and to consecutive sentence alignment but also that he neither promised or guaranteed a community corrections placement. Both trial attorneys opined in the post-conviction hearing that the petitioner understood the plea agreement and the rights he was waiving and that the decision to plead guilty was the petitioner's alone. Based upon counsels' testimony, the record supports the denial of the petitioner's claims of ineffective assistance of counsel and involuntary guilty pleas.

The claim of ineffective assistance of appellate counsel is predicated upon the asserted lapse of appellate counsel to assure a full record for direct appellate review.

We agree that the inclusion in the appellate record of a guilty plea submission hearing transcript is ordinarily necessary to afford the appellate court the opportunity to fulfill its mandate to review sentences de novo. *See, e.g.*, *State v. Keen*, 996 S.W.2d 842, 843 (Tenn. Crim. App. 1999); *State v. William Michael Clark*, No. M2007-00904-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Nashville, Mar. 31, 2008); *State v. Kristie L. Martin*, No. E2005-01898-CCA-R3-CD, slip op at 3-4 (Tenn. Crim. App., Knoxville, Sept. 22, 2006); *see also* T.C.A. § 40-35-210(b). Nevertheless, this court has frequently determined that a sentencing appeal following a guilty plea may be resolved on the merits despite the absence of a transcript of the plea submission hearing in the appellate record. *See, e.g.*, *State v. Vanda Watkins*, No. W2006-01209-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Jackson, Aug. 7, 2007), *perm. app. denied* (Tenn. 2008); *State v. Morgan Roa*, No. M2004-02560-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, Aug. 18, 2005).

Such was the case in *Danny Avery Stewart*. The court mentioned the absence of the plea submission hearing transcript but appears to have nevertheless adjudicated the petitioner's sentencing enhancement claims on the merits. In any event, in the post-conviction evidentiary hearing, the petitioner did not demonstrate that further review on direct appeal would have resulted in sentencing relief. Thus, the petitioner has failed to demonstrate prejudice from any deficient performance of appellate counsel.

In view of the foregoing holdings, the order of the post-conviction court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE